Whistleblower Newsletter ERA Cases

August 2005

U.S. Department of Labor
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for
Black Lung and
Traditional

Highlights of this issue:

Filing / pleading requirements:

• Adequacy of pleading; *Swierkiewicz* not applicable because ERA contains a gatekeeping function. *Hasan v. USDOL*, No. 03-1981 (1st Cir. Mar. 24, 2005) (case below ARB No. 03-058, ALJ No. 2000-ERA-10). [Page]

Request for hearing:

• Failure to serve opposing party. *Ponzi v. Williams Group International*, ARB No. 05-015, ALJ No. 2004-ERA-28 (ARB May 18, 2005); *Howell v. PPL Services, Inc.*, 2005-ERA-14 (ALJ Apr. 13, 2005). [Page]

Procedure:

• Protective order. *Williams v. Indiana Michigan Power Co.*, 2004-ERA-24 (ALJ Nov. 9, 2004). [Page]

• Audiovisual depositions. *Rosen v. Fluor Hanford, Inc.*, 2005-ERA-15 and 2005-TSC-1 (ALJ July 26, 2005). [Page]

• Option to remove to Federal Court. Energy Policy Act of 2005. [Page]

• Recusal, attorney cannot create grounds for. *Edward A. Slavin, Jr.*, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005). [Page]

• Attorney suspension proceeding. *Edward A. Slavin, Jr.*, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005) (cross-reference to the Miscellaneous Whistleblower Case Digest). [Page]

Protected activity:

• Environmental complaints must encompass public safety and health or the environment; ERA complaints only need to be about exposure to radioactivity. *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-3 (ARB Mar. 31, 2005). [Page]

Adverse action:

• Temporary unhappiness/upper management's immediate actions to undue employment action. *McNeill v. Crane Nuclear Inc.*, ARB No. 02-002, ALJ No. 2001-ERA-3 (ARB July 29, 2005). [Page]

Covered employers/employees:

• ERA amendments extend liability to the NRC, contractors or subcontractors of the NRC, and the DOE. Energy Policy Act of 2005. [Page]

• President and sole shareholder of contractor not an "employee" under *Darden. Demski v. USDOL*, No. 04-3753 (6th Cir. Aug. 17, 2005) (case below ARB No. 02-084, ALJ No. 2001-ERA-36). [Page]

Legal fees:

• ERA amendments prohibit the DOE from reimbursing a contractor or subcontractor for legal fees for certain appellate litigation. Energy Policy Act of 2005. [Page]

[Nuclear and Environmental Whistleblower Digest II A]
ADEQUACY OF PLEADING; *SWIERKIEWICZ* NOT APPLICABLE BECAUSE ERA CONTAINS A GATEKEEPING FUNCTION

In ***Hasan v. USDOL***, No. 03-1981 (1st Cir. Mar. 24, 2005) (case below ARB No. 03-058, ALJ No. 2000-ERA-10), the court rejected the Complainant's argument that his complaint should not have been dismissed because it contained the short, plain statement of his claim required by *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), because the complaint had not been dismissed solely based on allegations in his complaint and because the ERA whistleblower provision, unlike the statutes at issue in *Swierkiewicz*, includes a gatekeeping function.

[Nuclear and Environmental Whistleblower Digest III B 2]

TIMELINESS OF COMPLAINT; DATE OF DENIAL OF UNESCORTED ACCESS, WHICH WAS REQUIRED FOR THE COMPLAINANT'S POSITION, WAS DATE THAT BEGAN THE LIMITATIONS PERIOD

In ***Swenk v. Exelon Generation Co.***, ARB No. 04-028, ALJ No. 2003-ERA-30 (ARB Apr. 28, 2005), the ARB affirmed the ALJ's conclusion that the claim was not timely. The Complainant, a nuclear power plant employee whose position required an "unescorted access authorization," had been informed that his access had been suspended and that because his job required such access he must either regain his access authorization or locate a new position within the company not requiring unescorted access within 90 days. Later, he was informed that his unescorted access had been denied and he was no longer eligible for security access, and that he had 10 days to appeal this determination. The DOL whistleblower complaint was filed more than 180 days after this notice.

The ARB agreed with the Respondent's position that: (1) the decision to deny the Complainant unescorted access was communicated to him on November 5, 2002, and his claim was filed more than a month outside the limitations period; (2) the Complainant's position as a nuclear oversight assessment team leader required unescorted access; (3) once that access was denied, the Complainant was aware that he had lost his job as team leader permanently; (4) therefore, the November 5, 2002 letter was final, unequivocal notice of an adverse action that triggered the limitations period. The ARB found that there was no tolling based on the possibility that the Complainant might find a job not requiring access or that he could take an appeal of the denial of access.

[Nuclear and Environmental Whistleblower Digest VI B]
HEARING REQUEST; RESPONDENTS' FAILURE TO SERVE COMPLAINANT

In ***Ponzi v. Williams Group International***, ARB No. 05-015, ALJ No. 2004-ERA-28 (ARB May 18, 2005), the ALJ had dismissed the Respondents' hearing request with the Office of Administrative Law Judges because of their failure to serve it on the Complainant as required by regulation. On appeal the parties reached a settlement. Thus, the ARB did not decide the issue raised by the ALJ's recommended order of dismissal.

[Nuclear and Environmental Whistleblower Digest VI B]
FAILURE TO PROPERLY SERVE RESPONDENT WITH COPY OF REQUEST FOR ALJ HEARING

In ***Howell v. PPL Services, Inc.***, 2005-ERA-14 (ALJ Apr. 13, 2005), the ALJ found that the Complainant had failed to perfect a timely appeal because he failed to serve his request for a hearing on the Respondent in a timely or acceptable manner. The ALJ concluded that the regulatory time and manner requirements for serving notice on a respondent are substantive and mandatory, and that in the absence of compliance with those requirements, an ALJ does not have authority to consider the appeal. The ALJ cited in support *Webb v. Numanco, LLC*, 1998-ERA-27 (ALJ July 17, 1998) and *Cruver v. Burns Int'l*, 2001-ERA-31 (ALJ Dec. 5, 2001).

[Nuclear and Environmental Whistleblower Digest VII A 5]
[Nuclear and Environmental Whistleblower Digest VII B 5]

SUBPOENA AUTHORITY OF ALJ; PROTECTIVE ORDER TO PROTECT PRIVACY AND CONFIDENTIAL MATTERS TO EXTENT POSSIBLE

In ***Williams v. Indiana Michigan Power Co.***, 2004-ERA-24 (ALJ Nov. 9, 2004), the Respondent had served a subpoena on a non-party company seeking information about the Complainant's work for that company. The non-party company moved to quash the subpoena on the theory that ALJs do not have the authority to issue a subpoena to a non-party. The ALJ rejected this contention based on the ARB decision in *Childers v. Carolina Power & Light Co*., ARB No. 98-077, ALJ No. 1997-ERA-32 (ARB Dec. 29, 2000), which found that ALJs have subpoena power in ERA cases and which made no distinction between parties and non-parties. The ALJ found that *Childers* was controlling. He noted the decision of the District Court for the District of Columbia in *Bobreski v. U.S. Environmental Protection Agency*, 284 F.Supp.3d 67 (D.D.C. 2003) (which held that ALJs do not have supboena power in such cases), but found that it was not controlling as the instant case arises and would be heard in Michigan. The ALJ analyzed the type of information requested - which was specific to the Complainant and did not include any business information or trade secrets -- noted that under the non-party employer's guidelines the Complainant could sign a release, that the non-party employer's primary concern appeared to be (understandably) to protect the privacy rights of employees, that the Complainant and Respondent in the instant case had agreed to a protective order, and that the non-party employer had moved for a protective order if the motion to quash was denied. In view of all of this, the ALJ denied the motion to quash the subpoena and found that the protective order satisfied the needs of the non-party employer.

[Nuclear and Environmental Whistleblower Digest VII A 6]
DISCOVERY; AUDIOVISUAL DEPOSITIONS

In ***Rosen v. Fluor Hanford, Inc.***, 2005-ERA-15 and 2005-TSC-1 (ALJ July 26, 2005), the ALJ held that the Complainant's counsel could record depositions by audiovisual media following the procedures set out in FRCP 30(b)(2) and (4), and the Local Rules of the applicable federal district court. The ALJ ordered that the recorded media shall be retained in the custody of the attorney for the party recording the deposition, and that the recordings shall be held in confidence.

[Nuclear and Environmental Whistleblower Digest VII C 1]
OPTION TO REMOVE TO FEDERAL DISTRICT COURT IF DOL DOES NOT ISSUE A FINAL DECISION WITHIN ONE YEAR OF THE FILING OF THE COMPLAINT; ENERGY POLICY ACT OF 2005

On August 8, 2005, President Bush signed the **Energy Policy Act of 2005**. The Act amends the Energy Reorganization Act to permit removal to federal district court if the Department of Labor has not issued a final decision within one year after the filing of the complaint. The Act does not specify an effective date for the amendments in Section 629.

[Nuclear and Environmental Whistleblower Digest VII C 1]
[Nuclear and Environmental Whistleblower Digest XI A 2 c]
SUMMARY DECISION; MERE SPECULATION INADEQUATE TO DEFEND AGAINST MOTION SUPPORTED BY AFFIDAVITS THAT SHOW A FAILURE OF

PROOF ON ESSENTIAL ELEMENT OF CASE; REFUSAL TO HIRE, LACK OF KNOWLEDGE BY HIRING OFFICIALS OF PROTECTED ACTIVITY

In ***Hasan v. Enercon Services, Inc.***, ARB No. 04-045, ALJ No. 2003-ERA-31 (ARB May 18, 2005), the ARB affirmed the ALJ's dismissal on summary judgment where the Complainant had failed to set forth specific facts on an issue upon which he would bear the ultimate burden of proof at trial in response to a motion for summary judgment supported by affidavits from managers swearing that they had no knowledge of the Complainant's previous whistleblower activities when they made the decision not to hire him. In other words, the Respondent was entitled to summary decision where it established a complete failure of the Complainant's proof concerning an essential element of the case. The Complainant's only response to the motion had been speculation that the Respondent had not hired him because "some background check" must have disclosed his earlier whistleblower activities or that the affiants must have committed perjury.

To the same effect ***Hasan v. Southern Co.***, ARB No. 04-040, ALJ No. 2003-ERA-32 (ARB Mar. 29, 2005).

[Nuclear and Environmental Whistleblower Digest VII C 2]
[Nuclear and Environmental Whistleblower Digest IX B 4]
***PRO SE* LITIGANT; LESS LATITUDE FOR PROCEDURAL FAILURES WHERE THE LITIGANT IS EXPERIENCED AT WHISTLEBLOWER LITIGATION**

In ***Hasan v. Enercon Services, Inc.***, ARB No. 04-045, ALJ No. 2003-ERA-31 (ARB May 18, 2005), the ARB affirmed summary judgment against the Complainant where he failed to set forth specific facts on an issue upon which he would bear the ultimate burden of proof at trial in response to a motion for summary judgment supported by affidavits from managers swearing that they had no knowledge of the Complainant's previous whistleblower activities when they made the decision not to hire him. In a footnote, the ARB noted that although the Complainant was *pro se*, he was experienced in litigating whistleblower cases and had repeatedly been instructed as to the elements of a whistleblower case by OALJ, the ARB and the federal courts. Implicit in this footnote is the notion that a Complainant is not afforded as much latitude for procedural failures where, despite *pro se* status, he is well experienced with DOL whistleblower adjudications.

To the same effect ***Hasan v. Southern Co.***, ARB No. 04-040, ALJ No. 2003-ERA-32 (ARB Mar. 29, 2005).

[Nuclear and Environmental Whistleblower Digest VII D 4]
[Nuclear and Environmental Whistleblower Digest VIII A 5]
RECUSAL; BIAS MUST BE SHOWN TO STEM FROM EXTRA-JUDICIAL SOURCE; ATTORNEY CANNOT CREATE GROUNDS FOR RECUSAL

In ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), the Associate Chief ALJ had suspended an attorney from practice before OALJ under 29 C.F.R. § 18.34(g)(3). On appeal, the attorney and his client argued that the Associate Chief ALJ had been biased and had improperly failed to recuse himself "sua sponte" as they had requested.

The Board found that the attorney and his client had failed either to argue circumstances demonstrating that the judge was improperly biased against the attorney or to submit an affidavit to support recusal due to such bias as required by 29 C.F.R. § 18.31(b). Moreover, the Board stated that to overcome the presumption that ALJs act impartially, "Mr. Slavin would have to allege that Judge Burke harbored bias stemming from an extra-judicial source, rather than what he learned regarding Mr. Slavin from the evidence and proceedings in this case." (citations omitted). The Board rejected the petitioners' argument that the judge instituted the proceeding to retaliate against the attorney's criticism of DOL officials and the judge, finding that "an attorney should not benefit from the disqualification of a judge based on a controversy that the attorney has created." (citations omitted). The Board also rejected the petitioners' argument that the judge created the controversy; the Board finding that the attorney's professional misconduct had been well-documented by DOL ALJs, the ARB, and state and federal courts before the judge in a Notice of Judicial Inquiry, that the judge had administrative responsibility over whistleblower adjudications at OALJ and had learned of the attorney's misconduct in this capacity, and therefore he had "acted on his managerial and judicial responsibility to initiate a Section 18.34(g)(3) inquiry."

[Nuclear and Environmental Whistleblower Digest VIII B 3]
INTERLOCUTORY APPEAL; MOOTNESS; NO APPEAL OF INTERVENING RECOMMENDED DECISION ON THE MERITS

The ARB dismissed an interlocutory appeal of the ALJ's refusal to accept the Complainant's attorney's entry of appearance where the Complainant failed to respond to the ARB's order to show cause why the interlocutory appeal should not be dismissed as moot. The ARB raised the mootness issue because the Complainant had not appealed the ALJ's later recommended decision and order on the merits. ***Stinger v. Science & Engineering Associates, Inc.***, ARB No. 05-001, ALJ No. 2004-ERA-20 (ARB July 27, 2005).

[Nuclear and Environmental Whistleblower Digest IX B 4]
ARB BRIEFING REQUIREMENTS; FAILURE TO FILE BRIEF OR RESPOND TIMELY TO ORDER TO SHOW CAUSE; LATITUDE AFFORDING *PRO SE* LITIGANT HAS ITS LIMITS

In ***Ingram v. Shelly & Sands, Inc.***, ARB No. 04-090, ALJ No. 2002-ERA-27 (ARB Mar. 31, 2005), the ARB dismissed the Complainant's complaint for failure to prosecute where she failed to file a brief in support of her petition for review to the ARB pursuant to the ARB's scheduling order, and where she failed to timely respond to the ARB's order to show cause why her complaint should not be dismissed for failure to file a brief. The Complainant's untimely response to the order to show cause asserted a lack of knowledge of what a brief is or how to file it. The Board stated a willingness to extend a pro se litigant a degree of latitude in complying with its procedural requirements, but stated that status as a pro se litigant "does not confer upon [the Complainant] the right to simply disregard those orders that she does not understand without at least attempting to obtain further clarification. The ARB considered a lesser sanction of treating the Complainant's petition for review as her brief, but concluded that it would serve no purpose because it provided no support for a contention that the ALJ's recommended decision was wrong.

[Nuclear and Environmental Whistleblower Digest IX D 3]
MOTION FOR RECONSIDERATION; AFFIRMANCE OF ARB DECISION BY COURT OF APPEALS EXTINGUISHES ARB'S AUTHORITY TO RECONSIDER

In ***Saporito v. Florida Power & Light Co.***, ARB No. 04-079, ALJ Nos. 1989-ERA-7 and 17 (ARB Dec. 17, 2004), the Complainant filed objections, some phrased as motions for "reconsideration," of the ARB's 1998 decision in the matter. The ARB's decision had been summarily affirmed by the Eleventh Circuit Court of Appeals in 1999. *Saporito v. Florida Power & Light Co.*, ARB No. 98-008, ALJ Nos. 1989-ERA-7, 1989-ERA-17 (Aug. 11, 1998), *aff'd*, 199 F.3d 130 (11th Cir.1999) (unpublished table decision), *reh'g en banc denied*, 210 F.3d 395 (11th Cir. 2000). The ARB denied the Complainant's motions, finding that "[w]hatever authority we had to reconsider our own order was extinguished long ago by the Court of Appeals' conclusive disposition."

[Nuclear and Environmental Whistleblower Digest IX M 2]
ATTORNEY MISCONDUCT

See ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), in the Miscellaneous Whistleblower Case Digest for casenotes relating to the standards applicable to a 29 C.F.R. § 18.34(g)(3) suspension proceeding.

[Nuclear and Environmental Whistleblower Digest X P]
ADMISSIBILITY OF EVIDENCE OF REMEDIAL ACTION; ADMISSIBLE WHERE BEING USED FOR IMPEACHMENT

In ***McNeill v. Crane Nuclear Inc.***, ARB No. 02-002, ALJ No. 2001-ERA-3 (ARB July 29, 2005), the ALJ did not err in receiving into evidence an internal memo detailing remedial actions taken after two engineers had complained of being fired for objecting to a deficient work package where it was being used for impeachment, as permitted by FRE 407.

[Nuclear and Environmental Whistleblower Digest XII D 1 a]
PROTECTED ACTIVITY; ENVIRONMENTAL COMPLAINTS MUST ENCOMPASS PUBLIC SAFETY AND HEALTH OR THE ENVIRONMENT; ERA COMPLAINTS ABOUT EXPOSURE TO RADIOACTIVITY HOWEVER ARE COVERED REGARDLESS OF WHETHER EXPOSURE TO THE PUBLIC IS IMPLICATED

In ***Devers v. Kaiser-Hill Co.***, ARB No. 03-113, ALJ No. 2001-SWD-3 (ARB Mar. 31, 2005), the ALJ had held that the Complainants had not engaged in protected activity under the whistleblower provisions of the ERA, TSCA, SWDA and CERCLA because the complaints related only to safety in the workplace failing under the OSH Act. The ARB affirmed the ALJ in regard to the three environmental statutes, but reversed in regard to the ERA. The ARB found that the OSH Act is preempted by the ERA where the matter involves non-federal employees whose working conditions are governed by a federal agency having statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health. *See* 29 U.S.C.A. § 653(b)(1). In the instant cases, the Complainants were employees of a company that had contracted with the DOE to decontaminate and decommission a nuclear weapons parts plant. DOE has exercised statutory authority to regulate occupational safety or health at government-owned, contractor-operated facilities. In addition, the Board

found that it had already ruled in *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14, slip op. at 18-22 (ARB Nov. 13, 2003) -- a case involving workers who were decommissioning nuclear weapons -- that "employee concerns about exposure to radioactive sources are covered by the ERA, regardless of whether exposure to public at large is implicated." *Id*., slip op. at 24. *See also Mosley v. Carolina Power & Light Co.*, 1994-ERA-23, slip op. at 4 (Sec'y Aug. 23, 1996) (involving the ALARA standards). In contrast, the ARB agreed with the ALJ that the environmental statutes "'generally do not protect complaints restricted solely to occupational safety and health, unless the complaints also encompass public safety and health or the environment.'" ***Devers***, slip op. at 10, *quoting Post v. Hensel Phelps Constr. Co.*, 1994-CAA-13, slip op. at 2 (Sec'y Aug. 9, 1995).

[Nuclear and Environmental Whistleblower Digest XIII A]
ADVERSE EMPLOYMENT ACTION; MERELY TELLING WORKERS TO GO HOME IS NOT PROOF OF FIRING

In ***McNeill v. Crane Nuclear Inc.***, ARB No. 02-002, ALJ No. 2001-ERA-3 (ARB July 29, 2005), the ARB held that a supervisor's telling workers to "go home" if they would not do an assigned job was not proof that the workers were fired.

[Nuclear and Environmental Whistleblower Digest XIII A]
ADVERSE EMPLOYMENT ACTION; LACK OF AUTHORITY OF MANAGER TO FIRE

In ***McNeill v. Crane Nuclear Inc.***, ARB No. 02-002, ALJ No. 2001-ERA-3 (ARB July 29, 2005), the ARB held that even though an internal memo detailing remedial actions taken by a manager after two engineers had complained of being fired for objecting to a deficient work package referred to a "termination," other evidence of record established that the person who purportedly fired the engineers had no authority to do so. Thus, the manager's action did not constitute adverse action.

[Nuclear and Environmental Whistleblower Digest XIII B 1]
BLACKLISTING; REQUIREMENT OF EVIDENCE THAT A SPECIFIC ACT OF BLACKLISTING OCCURRED

In ***Ingram v. Shelly & Sands, Inc.***, ARB No. 04-090, ALJ No. 2002-ERA-27 (ARB Mar. 31, 2005), the ALJ had found that the Complainant had not established that she had been a victim of blacklisting because she had not provided evidence of specific acts of blacklisting. The ARB found that the Complainant's assertion on review that she "had not been able to obtain employment in road work" and that she and her "union Business Agents seem to agree that [she] was blackballed" was an unsupported allegation insufficient to compel the ARB to reject the ALJ's finding. *See Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056, 02-059, ALJ No. 2001-CAA-18, slip op. at 8 (ARB Nov. 28, 2003).

[Nuclear and Environmental Whistleblower Digest XIII B 18]
ADVERSE EMPLOYMENT ACTION; ADMINISTRATIVE HOLD ON UNRESTRICTED ACCESS

Placing a temporary "administrative hold" on the unrestricted access of two workers was not adverse employment action where such action did not sever the

employment relationship or change the workers' clearance status; the Board found that the record did not support the Complainant's claim that this action harmed his job prospects at nuclear facilities because he would henceforward be required to report that his unrestricted access clearance had been denied at the Respondent's facility. ***McNeill v. Crane Nuclear Inc.***, ARB No. 02-002, ALJ No. 2001-ERA-3 (ARB July 29, 2005).

[Nuclear and Environmental Whistleblower Digest XIII D]
ADVERSE EMPLOYMENT ACTION; TEMPORARY UNHAPPINESS STANDING ALONE INSUFFICIENT TO ESTABLISH ADVERSE EMPLOYMENT ACTION; MANAGER'S IMMEDIATE AND THOROUGH ABORTING OF IMPROPERLY HANDING BY IMMEDIATE SUPERVISOR

The Respondent did not engage in adverse employment action where the Complainant suffered, at most, only temporary unhappiness. The record established that a manager immediately and thoroughly aborted any adverse consequences when he recognized that the matter had not been properly handled by the Complainant's immediate supervisor. ***McNeill v. Crane Nuclear Inc.***, ARB No. 02-002, ALJ No. 2001-ERA-3 (ARB July 29, 2005).

[Nuclear and Environmental Whistleblower Digest XIV A 2 c]
[Nuclear and Environmental Whistleblower Digest XIV B 4 e]
COVERED EMPLOYERS; ENERGY POLICY ACT OF 2005; THE NRC; NRC CONTRACTORS AND SUBCONTRACTORS; DEPARTMENT OF ENERGY

On August 8, 2005, President Bush signed the **Energy Policy Act of 2005**. The Act amends the Energy Reorganization Act to extend liability under the ERA whistleblower provision to the Nuclear Regulatory Commission, contractors or subcontractors of the Commission, and the Department of Energy.

[Nuclear and Environmental Whistleblower Digest XIV A 2 d]
COVERED EMPLOYEE; USE OF COMMON LAW *DARDEN* FACTORS; COMPLAINANT WHO WAS THE SOLE SHAREHOLDER OF CORPORATIONS THAT SUPPLIED CONTRACT SERVICES WAS NOT EMPLOYEE

In ***Demski v. USDOL***, No. 04-3753 (6th Cir. Aug. 17, 2005) (case below ARB No. 02-084, ALJ No. 2001-ERA-36), the Petitioner was the president and sole shareholder of corporations that supplied contract labor and technical knowledge to power-generating plants, including a contract to main ice condensers. The Petitioner learned of serious safety problems with an ice condenser and reported those problems to the power plant. The power plant thereafter terminated the ice condenser contract, refused the Petitioner's bids to continue on two other contracts, and revoked employee access badges for the Petitioner and her employees. The ALJ and the ARB granting summary decision finding that the Petitioner was not an "employee" within the meaning of the ERA whistleblower provision, applying the common law definition of employee stated in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). The Sixth Circuit affirmed the use of *Darden* to define the meaning of an "employee" under the ERA, and the weighing of the *Darden* factors in this case to find that the Petitioner was not an employee.

[Nuclear and Environmental Whistleblower Digest XVI E 5]

REIMBURSEMENT FOR LEGAL FEES FOR APPEAL; DOE CONTRACTORS AND SUBCONTRACTORS UNDER ENERGY POLICY ACT OF 2005

On August 8, 2005, President Bush signed the Energy Policy Act of 2005. The Act amends the Energy Reorganization Act to prohibit the Department of Energy from reimbursing a contractor or subcontractor for legal fees incurred subsequent to an ALJ finding against the contractor or subcontractor on the merits, unless the ALJ's determination is reversed on appeal. This amendment applies to contracts entered into after the date of enactment.

[Nuclear and Environmental Whistleblower Digest XVIII B 1 b]
TIMELINESS OF APPEAL; ABSENCE OF NOTICE OF APPEAL RIGHTS IN ALJ DECISION INSUFFICIENT TO ESTABLISH EQUITABLE GROUNDS FOR EXCUSING UNTIMELY APPEAL WHERE COMPLAINANT HAD PRIOR NOTICE OF APPEAL PROCEDURE FROM EARLIER CASE

In ***Santamaria v. U.S. Environmental Protection Agency***, ARB No. 05-023, ALJ No. 2004-ERA-25 (ARB Mar. 31, 2005), the Complainant had previously appealed the decision of the ALJ in an earlier case. The ALJ had included a notice of appeal rights in the earlier decision. When issuing his recommended decision in the instant case, the ALJ did not include a notice of appeal rights. The Complainant failed to file a timely appeal. The ARB found that equitable considerations did not excuse the untimely appeal because "[t]he fact that a party did not know that the law required him to timely file a petition will generally not support a finding of entitlement to equitable tolling." (citation omitted). Moreover, the Board found that, in this case, the Complainant knew, or should have known that he was required to file a timely appeal because he had personally been served with the ALJ's decision in the earlier case, as well as several ARB orders.

[Nuclear and Environmental Whistleblower Digest XX E]
STATE SOVEREIGN IMMUNITY

In ***Farmer v. Alaska Dept. of Transportation & Public Facilities***, ARB No. 04-002, ALJ No. 2003-ERA-11 (ARB Dec. 17, 2004), the ARB affirmed the ALJ's dismissal of the complaint on state sovereign immunity grounds. The Complainant argued that sovereign immunity should not apply because he was not acting as a private citizen, but in furtherance of his official duties as the Department's radiation safety officer. The Board rejected this argument, agreeing with the ALJ's observation that the remedy sought was money damages for the Complainant himself against the state agency Respondent.

The Complainant next argued that his position was federally mandated and that his investigations and activities were funded by the U. S. Department of Transportation, Federal Highway Administration, and therefore -- by accepting federal funding -- the State of Alaska "implicitly" agreed to federal jurisdiction, i.e., waived state sovereign immunity. The ARB rejected this argument noting that they had previously ruled that "acceptance of federal funds unaccompanied by an express, unambiguous waiver of immunity is insufficient to confer a private right of action for discrimination."

The Complainant's third argument was that the State of Alaska grants immunity to individuals and indemnification for official actions pursuant to a collective bargaining agreement, and therefore has agreed to act on behalf of individuals and is a real party in interest The ARB agreed with the ALJ, however, that "[a]n immunity and indemnification agreement is not an explicit waiver of sovereign immunity." The Board added "[t]he state's election to indemnify employees for official acts does not change the character of Farmer's complaint from one brought by a private party to one brought by the government."

Finally, on appeal the Complainant raised a new argument that because it is a licensee, the state Department has agreed to comply with NRC rules and regulations against discrimination. The Board declined to consider a new issue on appeal, but nonetheless observed that in a prior case it had held that the prohibition on discrimination as a condition of an NRC license was not enough to show that the government agency consented to a discrimination suit that included an award of money damages.

[Nuclear and Environmental Whistleblower Digest XXI B]
CLAIM PRECLUSION; FEDERAL COURT JUDGMENT IN STATE COMMON LAW WHISTLEBLOWER COMPLAINT

Since the Complainant could not have litigated his ERA whistleblower complaint along with his state common law whistleblower complaint in federal court, a federal court judgment in the state claim did not not bar the DOL proceeding. ***McNeill v. Crane Nuclear Inc.***, ARB No. 02-002, ALJ No. 2001-ERA-3 (ARB July 29, 2005).